Filed 5/17/10 P. v. Lopez CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH DONALD LOPEZ, Defendant and Appellant.	C059246 (Super. Ct. No. 08F01246)

After his motion to dismiss was denied, defendant Joseph Donald Lopez entered a no contest plea to carrying a concealed firearm (Pen. Code, § 12025, subd. (b)(6)) in exchange for no state prison at the outset and 210 days in county jail as a condition of probation. The court granted probation for a term of five years subject to certain terms and conditions including the agreed upon jail time.

Defendant appeals. He contends the trial court erroneously denied his motion to dismiss which was a renewal of his motion to suppress made at the preliminary hearing. He claims there was no basis for his detention or patdown. We modify

defendant's presentence credits and affirm the judgment (order of probation).

FACTS[1]

About 7:00 p.m. on February 18, 2008, Sacramento Police Officer Kathleen Fritzsche and her partner Officer Carson patrolled near various parks based on complaints about activities after dark. The officers drove to the area of Lawrence Park and saw 10 to 20 people in the middle of the street and near cars parked along the edge of the park. The park was closed after dark and it was very dark. There were signs posted on all four sides of the park notifying users that the park was closed from sunset to sunrise.

Officer Fritzsche decided to investigate. She turned the corner, activating her high beams, and "very leisurely" approached. She stopped her patrol car in the street about one to two car lengths from the first parked car (defendant's car) and one car width from the curb.[2] Defendant's car was parked just past one of the signs notifying the driver and occupants that the park was closed after dark. Officer Fritzsche parked the patrol car facing defendant's car at an angle; she did not intend to block defendant's car from moving. She turned on her

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[1] The facts are taken from the transcript of the preliminary hearing at which defendant moved to suppress the evidence.

[2] For clarity, the first parked car will be identified as defendant's car.

spotlight to illuminate defendant's car. Three men were in defendant's car and all immediately got out.

The people in the street and near the cars walked off in several directions but remained within sight and hearing distance.

The officers got out and stood in their respective doorways of the patrol car. They did not draw their service weapons.

Two of the men in the car, the driver and the front seat passenger, approached the officers. Defendant got out of the rear passenger seat through the door next to the curb, immediately walked on the sidewalk away from the officers to the trunk area of his car, and turned to face the officers.

Officer Fritzsche could not see below defendant's shoulders and did not know what he was doing. He was wearing a bulky jacket. She was concerned he was attempting to conceal or dispose of something. Officer Fritzsche asked defendant a couple of times to come out from behind his car and to approach the officers.

Defendant hesitated "five seconds or so" and then walked on the sidewalk very slowly toward the patrol car. Officer Fritzsche still could not see defendant very well because he was blocked by his car. She moved toward the sidewalk in order to see his hands and whole body. Defendant had his hands in his jacket pockets. Officer Fritzsche asked defendant to remove his hands from his pockets but he did not do so.

Based on her training and experience, Officer Fritzsche was concerned about defendant's lack of cooperation and the

possibility he may have a weapon. She drew her weapon and pointed it at him. She ordered him to remove his hands from his pockets. He did so.

Officer Carson called for backup because of the number of people milling about and defendant's behavior.

The three men from defendant's car were ordered to sit on the sidewalk. During the two or three minutes before backup arrived, defendant was "very fidgety," looked around, put his legs up in order to stand up, and moved his hands out of view.

Without prompting, defendant told the officers he was on probation for grand theft auto. Officer Fritzsche handcuffed him. He stiffened up and wanted to know why he was being handcuffed. Based on his conduct and for officer safety, Officer Fritzsche conducted a patdown and found a loaded .45 caliber semi-automatic pistol in his front pants pocket. The gun had been reported as stolen in 2005.

Defense counsel argued below that the search was unlawful because an objectively reasonable person would believe defendant was detained without reasonable suspicion: (1) when the officers blocked in his car which was on a roadway and he was not in the park after dark, but merely an occupant in a car parked next to the park; (2) when the officers used the spotlight on his car; (3) when he was ordered to come out from behind his car; or (4) when he was ordered at gunpoint to remove his hands from his pockets.

The prosecutor cited Sacramento City Code 12.72.090, subdivision (d), claiming it specified that a park is closed

from sunset to sunrise if at least one sign is posted to that effect. The prosecutor asserted: (1) the evidence did not show defendant's car was blocked-in; (2) reasonable suspicion supported Officer Fritzsche's request to defendant to come from behind his car and, (3) based on defendant's behavior, Officer Fritzsche could pull her weapon and conduct a search for officer safety.

Judge Kevin McCormick, concluded the officers were properly investigating activities after dark at the park having received complaints and observing the people milling about the closed park. The two men with defendant initiated a consensual encounter when they got out of defendant's car and approached the officers. While those two men approached the officers, defendant went behind his car and faced the officers, causing the officers to be apprehensive for their safety since his car blocked their view of him from the shoulders down.

Judge McCormick concluded, in view of the cooperative behavior of the other occupants, Officer Fritzsche's direction to defendant to come toward her was reasonable so she could observe what he was doing. Officer Fritzsche moved from the cover of her patrol car door to the sidewalk to see what defendant was doing. "When she did, she observed his hands in his pocket[s of his bulky jacket], which heightened her concern even further given the previous conduct of the defendant. She asked him to remove his hands from his pocket[s], which he did not initially do." This enhanced the officer's apprehension for her and her partner's safety. After he was seated on the

sidewalk, defendant's behavior continued to raise suspicions that he was armed.

Judge McCormick declared, in part, "[M]ost law enforcement officers who end up fatally or seriously injured due to handgun encounters, it comes from a lack of due diligence toward the protection of themselves and their partner[s] and is generally in circumstances which are initially perceived as being nonthreatening.

"[Officer Fritzsche] did what I would expect and what I think the law expects is a reasonable and diligent way to address this particular situation as it unfolded out in the field in front of her . . . ."

In short, Judge McCormick concluded Officer Fritzsche's actions were reasonable and diligent, she conducted her patdown search of defendant for officer safety, and denied defendant's motion to suppress.

In the trial court, defendant renewed the motion to suppress by filing a motion to dismiss. Judge Russell Hom denied the motion, finding defendant was detained when the officers ordered him to approach and the officers had a reasonable suspicion to justify the patdown search based on defendant's behavior.

DISCUSSION

Defendant contends the trial court erroneously denied his motion to dismiss, claiming there was no basis for his detention or the patdown search. We disagree.

With respect to a suppression motion initially decided by the magistrate and thereafter renewed by defendant with his motion to dismiss in superior court, we defer to the magistrate's factual findings, express or implied, when supported by substantial evidence and, based thereon, determine independently whether the search or seizure was reasonable under the Fourth Amendment. (*People v. Laiwa* (1983) 34 Cal.3d 711, 718; *People v. Soun* (1995) 34 Cal.App.4th 1499, 1507.)

Here, we review Judge McCormick's factual findings and disregard those of Judge Hom.

We also follow the dictates of the national charter. "Pursuant to article I, section 28, of the California Constitution, a trial court may exclude evidence under Penal Code section 1538.5 only if exclusion is mandated by the federal Constitution." (*People v. Banks* (1993) 6 Cal.4th 926, 934.)[3]

A police officer's contact with an individual can range from the least intrusive, that is, a consensual encounter, which results in no restraint of an individual's liberty whatsoever, to a detention, which is a limited seizure based on an articulable suspicion that an individual has committed or is about to commit a crime, and, finally, to the most intrusive, an arrest, which is a seizure based on probable cause. (*Florida v. Royer* (1983) 460 U.S. 491, 497-499 [75 L.Ed.2d 229, 236-237];

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[3] California Constitution, article I, section 28, subdivision (f)(2) (same as former Cal. Const., art. I, § 28, subd. (d), renumbered without substantive change by vote of the people on Nov. 5, 2008.)

Wilson v. Superior Court (1983) 34 Cal.3d 777, 784; *People v. Daugherty* (1996) 50 Cal.App.4th 275, 282-283.)

"[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free 'to disregard the police and go about his business,' [citation], the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." (*Florida v. Bostick* (1991) 501 U.S. 429, 434 [115 L.Ed.2d 389, 398]; see *United States v. Mendenhall* (1980) 446 U.S. 544, 554 [64 L.Ed.2d 497, 509] (plur. opn. of Stewart, J.).)

"Where a consensual encounter has been found, police may inquire into the contents of pockets [citation]; ask for identification [citation]; or request the citizen to submit to a search [citation]. It is not the nature of the question or request made by the authorities, but rather the manner or mode in which it is put to the citizen that guides us in deciding whether compliance was voluntary or not." (*People v. Franklin* (1987) 192 Cal.App.3d 935, 941 (*Franklin*).)

A detention "involves a seizure of the individual for a limited duration and for limited purposes. A constitutionally acceptable detention can occur 'if there is an articulable suspicion that a person has committed or is about to commit a crime.'" (*People v. Bailey* (1985) 176 Cal.App.3d 402, 405 (*Bailey*).)

"A seizure occurs whenever a police officer 'by means of physical force or show of authority' restrains the liberty of a person to walk away." (*People v. Souza* (1994) 9 Cal.4th 224, 229 (*Souza*), quoting *Terry v. Ohio* (1968) 392 U.S. 1, 19, fn. 16 [20 L.Ed.2d 889, 904-905] (*Terry*).) "Whether a seizure has taken place is to be determined by an objective test, which asks 'not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person.'" (*People v. Celis* (2004) 33 Cal.4th 667, 673; *California v. Hodari D.* (1991) 499 U.S. 621, 628 [113 L.Ed.2d 690, 698]; *United States v. Mendenhall, supra,* 446 U.S. at p. 554.)

Defendant contends he was unlawfully detained when Officer Fritzsche parked in front of the car he occupied, blocking his movement, and illuminated his car with high beams and a spotlight. We disagree. The use of high beams and spotlighting defendant's car did not alone constitute a show of authority such that a reasonable person would not feel free to leave. "While the use of high beams and spotlights might cause a reasonable person to feel himself the object of official scrutiny, such directed scrutiny does not amount to a detention." (*People v. Perez* (1989) 211 Cal.App.3d 1492, 1496; see also *People v. Brueckner* (1990) 223 Cal.App.3d 1500, 1505; *Franklin, supra*, 192 Cal.App.3d at p. 940; *People v. Rico* (1979) 97 Cal.App.3d 124, 129-130.) Neither did the positioning of the patrol car. "[T]he fact that a police vehicle had *stopped* near defendant's vehicle would not communicate to a reasonable person

that the officers intended to detain" the defendant. (*People v. Turner* (1994) 8 Cal.4th 137, 180, original italics; see also *Franklin, supra,* 192 Cal.App.3d at p. 940.)

According to Officer Fritzsche, the patrol car was parked in such a manner to allow the driver of defendant's car to leave; the driver was not boxed in with the patrol car or otherwise prevented from leaving. She parked the patrol car in the street, one or two car lengths away and a car width from the curb which allowed defendant's car egress. No siren or emergency light were activated. We find no evidence of a detention based on the manner in which Officer Fritzsche parked the patrol car or utilized the car's lights.

Defendant relies on *People v. Wilkins* (1986) 186 Cal.App.3d 804. *Wilkins* held that a detention occurred where the officer parked his marked patrol car behind the defendant's car in such a manner to block the car from leaving the scene. (*Id.* at pp. 807, 809.) *Wilkins* is factually distinguishable because Officer Fritzsche did not block defendant's vehicle.

Defendant relies on a handful of other cases that are also factually distinguishable. (*People v. Garry* (2007) 156 Cal.App.4th 1100, 1104, 1111-1112 [detention occurred where officer in marked patrol car turned on spotlight on pedestrian on corner, got out of car, and quickly approached while questioning him about probation or parole status]; *People v. Roth* (1990) 219 Cal.App.3d 211, 213, 215 [detention occurred where officers in patrol car turned on spotlight on lone pedestrian in empty parking lot, got out of car, and commanded

him to approach so they could talk to him]; *People v. Bailey, supra,* 176 Cal.App.3d at pp. 404-406 [detention occurred where officer in unmarked patrol car pulled behind defendant's car and turned on his front and rear emergency lights].)

In the alternative, defendant contends he was unlawfully detained when Officer Fritzsche *commanded* him to approach her. We again disagree. All three occupants got out of the car voluntarily. While the driver and another occupant of the car, on their own initiative, voluntarily approached the officers, defendant, wearing a very large and bulky jacket, walked away from the officers, stopped and positioned himself behind the rear of his car, in sight, but with his body and arms obscured below his shoulders. Although a reasonable person would feel free to walk away completely, defendant chose to stop at the back of his car, turn, partially obscure himself, and face the officers. Because he was hidden below the shoulders from her view and he was wearing a bulky jacket, Officer Fritzsche reasonably feared he could be disposing of, or concealing something. After defendant moved to the rear of his car, she "began calling to him to come out from behind the car and come to where [they] were."

On cross-examination, Officer Fritzsche confirmed she asked defendant to come forward and he paused. She confirmed she asked defendant again. Only then did he move forward.

We here mention one conclusion of the magistrate with which we disagree. Substantial evidence *does not* support his determination Officer Fritzsche "ordered" defendant to come

toward her. That simply was not her testimony, which was unrebutted.

Unfolding circumstances did not suggest Officer Fritzsche did more than ask defendant to step forward. Defendant's companions were not ordered to approach. Instead, on their own initiative, they voluntarily got out of the car and approached the officers.

Defendant, on his own initiative, voluntarily got out of his car, with one crucial difference. Instead of following along with his two companions, he deliberately made his way to the back of his car and stood there, partially obscured. There was nothing in Officer Fritzsche's mode or manner to suggest she was issuing orders or commands. She did no more than request defendant approach her in the same fashion as had his companions. (See *Franklin, supra,* 192 Cal.App.3d at pp. 941-942.) There was no show of authority. Defendant could have walked away, at the outset. Instead, he chose to remain, in a partially obscured and threatening position he assumed behind the car, even as a crowd of more than a dozen people lingered nearby.

Defendant alone catalyzed his patdown search and eventual arrest and prosecution. He unlawfully armed himself with a stolen handgun which he concealed upon his person and did not leave the scene by walking away when he was at liberty to do so. Officer Fritzsche's apprehension for her safety and the safety of others was created by defendant himself. Officer Fritzsche's apprehension arose precisely because defendant dallied nearby

and personally chose neither to fly nor light. Thus, defendant is unpersuasive when he claims he was detained by Officer Fritzsche.

When Officer Fritzsche finally did ask him to come forward, he hesitated several seconds before walking slowly forward on the sidewalk. Because she still could not see defendant's hands, she left the protection of her patrol car door and walked over to the sidewalk where she saw his hands in his pockets. She asked him to remove his hands from his pockets. He refused to do so. She then drew her weapon and ordered him to do so.

We agree, he was detained when he removed his hands from his pockets. But, was it a lawful detention? We conclude it was.

"The guiding principle in determining the propriety of an investigatory detention is 'the reasonableness of all the circumstances of the particular governmental invasion of a citizen's personal security.' [Citations.] In making our determination, we examine 'the totality of the circumstances' in each case. [Citations.]" (*People v. Wells* (2006) 38 Cal.4th 1078, 1083.) "When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing. [Citation.] This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information

available to them that 'might well elude an untrained person.' [Citations.] Although an officer's reliance on a mere '"hunch"' is insufficient to justify a stop [(*Terry, supra*, 392 U.S. at p. 27)], the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard [citation]." (*United States v. Arvizu* (2002) 534 U.S. 266, 273-274 [151 L.Ed.2d 740, 750-751]; *Souza, supra*, 9 Cal.4th at pp. 230-231.)

Defendant claims there were no specific and articulable facts to suggest he was involved in criminal activity. Citing Sacramento City Code sections 12.72.010 and 12.72.090, he says he was not in a closed public park but, instead, in a car legally parked on the street adjacent to the park. He claims Officer Fritzsche's mistake of law, that is, erroneously relying upon the city ordinances to detain him, made the detention objectively unreasonable.

Defendant further says Officer Fritzsche's action in detaining him because he was in a occupied, parked car near a park at night was completely arbitrary since she never claimed she believed he and his companions were in the park after dark.

Defendant claims his hesitation in responding to Officer Fritzsche's *order* to approach her was the tainted product of an illegal detention and thus subject to suppression.

Further, he claims his hesitation was reasonable under the circumstances because he did not feel free to leave, Officer Fritzsche's actions were unwarranted and, if he walked away, he

would be charged with resisting. Similarly, his hesitation in removing his hands from his pockets was reasonable because his detention was unwarranted and he wanted to stay warm.

All his claims are faulty. Based on full and careful assessment of the totality of circumstances, we conclude Officer Fritzsche exercised caution almost to a fault and had a reasonable, articulable suspicion that defendant might be armed and violent or, perhaps, deadly, and that criminal activity might have occurred or was about to occur. "[A] temporary detention of a person for the purpose of investigating possible criminal activity may, because it is less intrusive than an arrest, be based on 'some objective manifestation' that criminal activity is afoot and that the person to be stopped is engaged in that activity." (*Souza, supra,* 9 Cal.4th at p. 230.)

Officer Fritzsche and her officer companion were in potential jeopardy beyond those involving defendant and his two companions alone. There was a group of people milling in the street adjacent to the closed park in which they all may have been after dark, unlawfully, the very complaints the officers were investigating. Defendant's car was parked next to the curb along the park near a sign notifying them of the park's closure after sunset. Moreover, defendant's behavior contributed to the totality of the circumstances justifying his detention. He walked away from the officers, stopped behind his car suspiciously and partially obscured, and turned to face the officers when the other occupants of his car had voluntarily and unhesitatingly approached them. From his partially obscured

position, defendant hesitated to approach the officers, when asked, and failed to cooperate, when asked, to remove his hands from his pockets.

Doubtless, defendant's suspicious, threatening conduct, enhanced by his partial concealment, compelled Officer Fritzsche to draw her weapon and order defendant at gunpoint to remove his hands from his pockets. Only then did he respond. Of course, he was detained at that point, but entirely reasonably and, thus, lawfully. Defendant's risky behavior, the non-risky behavior of his two companions, along with all the contextual circumstances made it so.

Defendant misplaces his reliance upon *People v. Lopez* (1987) 197 Cal.App.3d 93 where the defendant was detained based on a mistake of law, that is, the officer believed it was illegal to have an open beer can while sitting in a parked car in a parking lot of a public park. *Lopez* concluded the parking lot was not a "'highway'" for purposes of the statute the officer believed defendant had violated. (*Id.* at pp. 95, 98-102.) *Lopez* is distinguishable. Officer Fritzsche did not rely solely upon defendant's possible violation of city ordinances which prohibit being in the park after dark.

Even if the detention was reasonable, defendant argues, his patdown was unreasonable because there were no circumstances that would lead a reasonably prudent person to believe defendant was armed and dangerous. He also claims his admission he was on probation for grand theft auto did not justify the patdown and was not relied upon by the trial court. Whether or not

mentioned by the magistrate, defendant makes no claim that his probation admission was not part of the totality of circumstances known to Officer Fritzsche and thus part of her decisionmaking matrix.

The People correctly claim Officer Fritzsche's patdown search for weapons was warranted by the circumstances and for purpose of officer safety.

Terry, supra, 392 U.S. 1 held that an officer has the authority to conduct a patdown search for weapons where that officer has reason to believe a suspect is armed and dangerous. The officer need not have probable cause to arrest the person for an offense or be absolutely certain that the person is armed. The test is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." (*Id.* at p. 27; see also *People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1230.) "'A frisk following a detention for investigation "is an additional intrusion, and can be justified only by specification and articulation of facts supporting a reasonable suspicion that the individual is armed.' [Citation.]" (*People v. Suennen* (1980) 114 Cal.App.3d 192, 199.)

The patdown search itself is "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." (*Terry, supra,* 392 U.S. at p. 26.) "'"The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his [or her] investigation without fear of violence."'

[Citation.]" (*People v. Limon* (1993) 17 Cal.App.4th 524, 534.) "The judiciary should not lightly second-guess a police officer's decision to perform a patdown search for officer safety. The lives and safety of police officers weigh heavily in the balance of competing Fourth Amendment considerations." (*People v. Dickey* (1994) 21 Cal.App.4th 952, 957.)

Officer Fritzsche's initial apprehension for officer safety was not dispelled by unfolding events. (See *Terry, supra*, 392 U.S. at p. 30 [patdown search authorized where officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, . . . and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety . . . ."].) Only when Officer Fritzsche drew her weapon did defendant remove his hands from his jacket pockets. While waiting for backup, defendant was very fidgety and tried to get up off the sidewalk. Officer Fritzsche observed defendant's movements and defendant failed to keep his hands visible. Defendant told the officers that he was on probation for grand theft auto. Officer Fritzsche handcuffed defendant, who stiffened up. She then conducted a patdown search for weapons. All of the factors considered in combination supported a reasonable suspicion defendant was armed and presently dangerous. The magistrate found the patdown search was justified by defendant's actions and was conducted for officer safety reasons. Under the circumstances, Officer Fritzsche

could have reasonably believed in the possibility a weapon might be used against her and her partner. We conclude the patdown search was objectively reasonable in view of defendant's actions and Officer Fritzsche's legitimate apprehension for her safety and that of others. Defendant's motion to suppress evidence was properly denied.

Pursuant to this court's miscellaneous order No. 2010-002, filed March 16, 2010, we deem defendant to have raised the issue (without additional briefing) of whether amendments to Penal Code section 4019, effective January 25, 2010, apply retroactively to his pending appeal and entitle him to additional presentence credits. As expressed in the recent opinion in *People v. Brown* (2010) 182 Cal.App.4th 1354, we conclude that the amendments do apply to all appeals pending as of January 25, 2010. Defendant is not among the prisoners excepted from the additional accrual of credit. (Pen. Code, § 4019, subds. (b), (c); Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50.)

Here, in granting probation, the trial court ordered defendant to serve 210 days in county jail with credit for time served of 52 days. The trial court did not award conduct credit. There is no indication, however, that defendant is not entitled to conduct credit in this case.

The probation report calculates credit from the date of defendant's arrest in the current case, February 18, 2008, through June 10, 2008, but notes that defendant was serving time on another case from February 18, 2008, through April 19, 2008.

The probation report reflects that defendant lost five days of good time credit for bad behavior in jail on March 20, 2008, when defendant was serving time on this other case. Defendant was not sentenced in the current case until June 13, 2008. Defendant's credit in the current case should be calculated from April 20, 2008, through June 13, 2008, which totals 55 actual days rather than 52 days the court awarded. Thus, defendant having served 55 actual days of presentence custody, is entitled to 54 days of conduct credits.

DISPOSITION

The judgment (order of probation) is modified to provide for 55 actual days and 54 conduct days for a total of 109 days of presentence custody credit. The trial court is directed to prepare an amended order of probation and to forward a copy of the same to the appropriate agency and defendant. As modified, the judgment (order of probation) is affirmed.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

CANTIL-SAKAUYE, J.